Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	MM Docket No. 00-167
Children's Television Obligations of	)	
Digital Television Broadcasters	)	
	)	

MOTION FOR ADMINISTRATIVE STAY
PENDING APPEAL OF VIACOM INC.

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I. SUMMARY

By this motion, Viacom Inc. ("Viacom") respectfully requests that the Federal Communications Commission ("Commission" or "FCC") enter an administrative stay pending resolution of Viacom's appeal of the Commission's Report and Order on the Children's Television Obligations of Digital Television.[1] An administrative stay is amply justified here. The children's television rules adopted in the *Order* present, at the very least, grave statutory and constitutional questions. Specifically, the rules violate the Administrative Procedure Act ("APA"), the Children's Television Act ("CTA"), and the First Amendment. In the interest of fairness, efficiency, and the orderly administration of the rulemaking process, the legality of the Commission's order should be resolved by the court on appeal *before* Viacom and other regulated entities are compelled to comply with the new rules promulgated therein.

The instant motion easily satisfies the four-part stay inquiry. First, Viacom is likely to succeed on the merits of its claims and, at a minimum, has raised "substantial" legal issues. Second, Viacom, along with other broadcasters and cable entities, will suffer irreparable harm, including the loss of First Amendment rights, unrecoverable economic losses, and competitive injury, if forced to comply with the new rules. Third, the balance of harms, given the irreparable nature of these injuries, favors the issuance of stay. Last, maintaining the *status quo* is clearly in the public interest. For these reasons, the Commission should enter an administrative stay of the *Order* pending judicial resolution of Viacom's petition for review.

In light of the harm that the current uncertainty imposes on Viacom's legal and business interests, Viacom respectfully asks that the Commission act on this request by October 13, 2005.

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1 *See Children's Television Obligations of Digital Television*, Report and Order, 19 FCC Rcd 22943 (2004) ("*Order*").

Because time is of the essence, should the Commission fail to act by that date, Viacom will treat the Commission's inaction as a denial for purposes of seeking further relief.

II. BACKGROUND

Under the CTA, enacted in 1990,[2] Congress imposed "commercial matter" limits for children's television programming on commercial television broadcasters and cable operators.[3] The CTA also required the Commission to consider whether a broadcaster has complied with these limits, as well as a broadcaster's overall commitment to children's programming, when reviewing license renewal applications.[4] Thereafter, the Commission issued implementing rules that, among other things: (1) defined "commercial matter" as "air time sold for purposes of selling a product"; (2) applied the "commercial matter" limits to programming targeted at children 12 years old and under; and (3) classified any program associated with a particular product as a "program-length commercial."[5]

In 1996, the Commission adopted additional children's programming rules. These measures included a definition of "core programming"[6] and a requirement that broadcasters identify "core programming" at the time it is aired and provide similar information to publishers

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2 47 U.S.C. §§ 303a, 303b & 394.

3 *Id.* § 303a(b) (limiting "commercial matter" to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays). Although this statutory obligation applies to cable systems operators, *see id.* § 303a(d) (defining "commercial television broadcast licensee" to "includ[e] a cable operator, as defined in section 602 of the Communications Act"), not cable programming networks, such as Nickelodeon, as a practical matter cable networks are expected to comply with the regulations as well. For convenience, but without conceding jurisdiction, references herein to cable operators includes cable networks.

4 *Id.* § 303b.

5 *Policies and Rules Concerning Children's Television Programming*, Report and Order, 6 FCC Rcd 2111, 2111-12 (¶¶ 1, 3) (1991), *recons. granted in part*, 6 FCC Rcd 5093 (1991).

6 47 C.F.R. § 73.671(c) (defining "core programming" as regularly scheduled, weekly programming of at least 30 minutes, aired between 7:00 a.m. and 10:00 p.m., that serves the educational and informational needs of children ages 16 and under).

of television programming guides.[7] The Commission also created a "processing guideline" for commercial broadcast license renewals. The FCC determined that, with respect to such applications, a licensee will receive the benefit of staff-level approval of the CTA portion of the application provided that the broadcaster airs at least 3 hours per week of "core programming" or, alternatively, demonstrates a level of commitment to children's programming equivalent to the 3-hour standard.[8] If a licensee does not meet this requirement, its renewal application will be referred to the full Commission for further review.[9]

In December 1999, the Commission released a Notice of Inquiry seeking views on a range of issues relating to the question of whether the advent of digital broadcasting should alter the existing public interest obligations of television broadcasters.[10] Thereafter, on October 5, 2000, the Commission issued a Notice of Proposed Rulemaking ("*NPRM*") seeking comment on "how these existing children's television obligations, developed with analog technology in mind, should be adapted to apply to digital television broadcasting."[11] In this precise context, the Commission sought comment on five issues: (1) educational and informational programming;[12] (2) preemption;[13] (3) commercial limits;[14] (4) promotions;[15] and (5) other steps to improve educational programming.[16]

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7 *See id.* § 73.673.

8 *See id.* § 73.671, Note 2.

9 *See id.*

10 *See generally In re Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry, 14 FCC Rcd 21633 (1999).

11 *See Children's Television Obligations of Digital Television Broadcasters*, Notice of Proposed Rulemaking, 15 FCC Rcd 22946, 22947 (¶ 10) (2000) ("*NPRM*").

12 *Id*. at 22952-56 (¶¶ 14-24).

13 *Id*. at 22956-57 (¶¶ 25-28).

The Commission received extensive comments. The comments were primarily and, given the focus of the *NPRM*, predictably directed to the foregoing children's programming issues in the context of digital television ("DTV"). The Commission issued the *Order* on November 23, 2004.[17] In the *Order*, the Commission took dramatic and unexpected action entirely outside the DTV context that had been the subject of the *NPRM*. Among other things, the Commission: (1) expanded the definition of "commercial matter" to include "program promotions" unless the promotions are for educational and informational ("E/I") programming (the "promotion rule");[18] (2) ruled that programming that is preempted more than 10% per quarter (unless for breaking news) will not count toward the 3-hour "core programming" obligation (the "preemption rule");[19] (3) counted toward the "commercial matter" limitation any display of website addresses during programming targeted to children ages 12 and under, unless the website meets the Commission's newly minted "four-part test" (the "website reference rule");[20] (4) banned "the display of website addresses in children's programs when the website uses characters from the program to sell products or services (the "website host-selling rule");[21] and (5) adopted a license renewal "benchmark" for multicast broadcasting, mandating extra amounts of core E/I programming in "rough[] proportion[] to the additional amount of free video

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14 *Id*. at 22957-60 (¶¶ 29-34).

15 *Id*. at 22960-61 (¶¶ 35-37).

16 *Id*. at 22961 (¶ 38).

17 *See supra* note 1.

18 *Order* at 22963-64 (¶¶ 55-59).

19 *Id*. at 22958 (¶¶ 40-42).

20 *Id.* at 22961-62 (¶¶ 50-51).

21 *Id.*

programming [broadcasters] choose to provide" (the "multicasting rule").[22] In addition, notwithstanding that the *NPRM* was largely limited to DTV, the Commission directed that the new rules be applied to *both* analog and digital television.

The *Order* was published in the Federal Register on January 3, 2005. The Commission received sixteen reconsideration petitions,[23] raising numerous legal issues, including constitutional objections based on the First Amendment, notice and comment and arbitrary and capricious challenges under the APA, and arguments that the *Order* exceeds the Commission's statutory jurisdiction. On January 31, 2005, the Commission stayed the effective date for the website rules until January 1, 2006.[24] Though the reconsideration petitions remain pending before the Commission, all of the rules at issue are currently due to take effect on January 1, 2006.

It was Viacom's preference that the Commission, in the first instance, resolve these substantial legal issues through the administrative process. Accordingly, Viacom, along with the Walt Disney Company, NBC Universal, Inc., and NBC Telemundo License Co., filed a Motion for Extension of Effective Date or, in the Alternative, Administrative Stay on September 26, 2005 in an effort to achieve modest interim relief pending the completion of Commission

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22 *Id.* at 22950 (¶ 19).

23 Specifically, on February 2, 2005, the following parties filed for reconsideration: Discovery Communications, Inc.; 4Kids Entertainment, Inc.; Turner Broadcasting Systems, Inc.; American Advertising Federation, American Association of Advertising Agencies, and Association of National Advertisers, Inc.; Fox Entertainment Group, Inc.; National Cable & Telecommunications Association; Cox Broadcasting, Inc. *et al*.; The Walt Disney Company; National Association of Broadcasters; NBC Telemundo License Co.; Fox Entertainment Group, Inc., NBC Universal, Inc., and Viacom Inc.; Nickelodeon; The WB Television Network; Children's Media Policy Coalition; Univision Communications, Inc.; and Maranatha Broadcasting Co., Inc.

24 *See Children's Television Obligations of Digital Television Broadcasters*, Order on Reconsideration, 20 FCC Rcd 2055 (2005) ("*2005 Order*"). The remaining rules were originally slated to go into effect on January 1, 2006. *See Order,* 19 FCC Rcd at 22970 (¶ 86).

reconsideration of the *Order*.[25] On September 23, 2005, however, the Office of Communications for the United Church of Christ, Inc. ("UCC") "remove[d]" itself from the petition for reconsideration filed by the Children's Media Policy Coalition.[26] Thereafter, on September 26, 2005, UCC instituted proceedings for review of the *Order* in the United States Court of Appeals for the Sixth Circuit.[27] UCC's preemptive action forced Viacom to withdraw its reconsideration petitions[28] and to file a petition for review in the United States Court of Appeals for the District of Columbia on October 3, 2005 in order to protect its legal rights.[29] Viacom now files this request for an administrative stay pending its appeal.

III. GRANTING AN ADMINISTRATIVE STAY IS WARRANTED AND IN THE PUBLIC INTEREST.

The Commission looks to the same factors as federal courts in determining whether to grant a stay: (1) the likelihood of success on the merits; (2) the likelihood of irreparable injury; (3) harm to other parties; and (4) the public interest.[30] Although Viacom has raised compelling constitutional and statutory objections to the new rules, "[t]o justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of

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25 *See* Motion for Extension of Effective Date or, in the Alternative, Administrative Stay, filed by NBC Universal, Inc. and NBC Telemundo License Co., The Walt Disney Company, and Viacom Inc, MM Docket No. 00-167 (September 26, 2005) ("Administrative Stay Motion").

26 *See* Letter to Marlene Dortch, Secretary FCC, from Angela Campbell, Counsel for The Office of Communications for the United Church of Christ, Inc., MM Docket No. 00-167 (Sept. 23, 2005).

27 *The Office of Communications for the United Church of Christ v. FCC*, Case No. 05-4189 (filed 6th Cir. Sept. 26, 2005).

28 *See* Letters to Marlene Dortch, Secretary FCC, from Helgi C. Walker, Counsel for Viacom Inc, MM Docket No. 00-167 (Oct. 3, 2005).

29 *Viacom Inc., v FCC*, Case No. 05-1387, (filed D.C. Cir. Oct. 3, 2005).

30 *See WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 15 FCC Rcd 13191, 13192-93 (¶ 4) (2000).

success is inversely proportional to the degree of irreparable injury evidenced."[31] As explained below, Viacom's motion satisfies each aspect of the FCC's stay inquiry.

A. VIACOM IS LIKELY TO SUCCEED ON THE MERITS OF ITS CHALLENGE TO THE COMMISSION'S ORDER AND, AT A MINIMUM, RAISES SUBSTANTIAL LEGAL ISSUES.

Viacom is likely to succeed on the merits of its claims that the rules are invalid and, at a minimum, raises "substantial" legal issues that warrant a stay pending appeal.[32] As set forth more fully below, the new children's television rules are not legally sustainable. Because it is likely that Viacom will prevail on the merits of its appeal, the Commission should issue an administrative stay pending appeal.

1. The Website Rules Violate the APA, Exceed the FCC's Jurisdiction, and Contravene the First Amendment.

The Commission's new website rules are legally infirm because they take the Commission far afield from the subjects raised in the *NPRM* (interactive television) and the Commission's traditional area of regulation (television programming). The rules also raise serious constitutional concerns.

First, the Commission did not provide the notice required by the APA in promulgating the website rules. As the D.C. Circuit has explained, the APA's notice requirement serves twin objectives: "(1) to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies; and (2) to assure that the agency will have before it the facts and information relevant to a particular administrative

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31 *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

32 *See Holiday Tours*, 559 F.2d at 843 (explaining that only a "substantial case on the merits" is required where the other three factors strongly favor a stay).

problem."[33] The processes employed by the Commission in adopting these rules deprived affected parties of the opportunity for notice and comment to which they are entitled and, at the same time, deprived the Commission itself of the record evidence it needs to make an informed decision.

Specifically, in the *NPRM*, the Commission invited comments on: (1) a proposal that the Commission prohibit all "direct links to commercial websites during children's programming;"[34] (2) differences between websites that carry only commercial products and those that offer educational products; and (3) issues related to the placement and timing of websites in program material.[35] In the *Order*, however, the Commission took no action with respect to "direct, interactive links to commercial Internet sites in children's programming,"[36] As the Commission explained, "[t]here is little if any use of direct Internet connectivity today in television programming of the type that was contemplated when the Notice in this proceeding was issued. Accordingly, we find that it would be premature and unduly speculative to attempt to regulate such direct connectivity at this time."[37] Instead, the Commission promulgated rules addressed to a completely different issue – the mere display of Internet addresses that appear, without interactive capability, during children's programming.

This final regulation limiting the display of Internet addresses that cannot be accessed without the use of a computer – as opposed to "direct, interactive, links to commercial Internet

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33 *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (internal citations and quotations omitted).

34 *Order*, 19 FCC Rcd at 22960 (¶ 48).

35 *Id.* at 22963 (¶ 55-56).

36 *Id.* at 22962 (¶ 53).

37 *Id.*

sites" – is neither the proposed rule nor a "logical outgrowth" of the proposed rule.[38] Instead, it is an entirely new rule that is far removed from the rationale underlying the *NPRM's* request for comment on issues related to the interactivity permitted by digital television,[39] and a proposed prohibition on "all direct links to commercial websites during children' s programming."[40]

With respect to the website host-selling rule, the Commission sought comment on the view that existing advertising restrictions, including host-selling policies, should apply to digital programs.[41] The Commission also sought comment on whether, even if certain direct commercial links were allowed, it should nevertheless "prohibit links to websites that sell products associated with the program in which the links appear under our program-length commercial policy, or links to websites where a . . . program host is used to sell products[.]"[42] Again, the Commission took no action with respect to direct links, but instead addressed the relationship between host-selling and the display of Internet addresses that cannot be accessed directly. The final rule limiting the display of Internet addresses in children's programs when the site uses characters from the program to sell products or services is neither the proposed rule nor a "logical outgrowth" of the proposed rule. Like the website reference rule, it is an entirely new rule that is far removed from the rationale of the *NPRM*.

The website rules also exceed the Commission's jurisdiction under the CTA, which does not grant the Commission authority over the Internet. The grant of regulatory jurisdiction

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38 *See* Pet. for Recons. of The WB Television Network, at 14-16 (filed Feb. 2, 2005).

39 *NPRM*, 15 FCC Rcd at 22957-58 (¶ 29).

40 *Id.* at 22958 (¶ 32).

41 *Id*. at 22958 (¶ 31).

42 *Id.* at 22959 (¶ 32).

conferred by the CTA is limited to programming that appears on television.[43] Indeed, in passing the CTA, Congress made specific findings concerning the harm that certain commercial content on children's *television* programming could work on children.[44] The content of a website simply is not "television programming" for purposes of the CTA. Accordingly, the CTA does not grant the Commission authority to superintend the content carried on Internet websites. Yet that is precisely the new website rules seek to do.[45]

In addition, the website rules are unconstitutional. By counting programming time with website references as commercial time unless the website meets the Commission's four-part test, the website reference rule severely limits the ability of regulated entities to inform their audience, including adults, about their websites. Such a restriction, which is neither narrowly tailored nor serves a compelling government interest, is constitutionally infirm. The rule fares no better on the ground that broadcasters and cable operators may comply by changing the content of their websites: that "option" also runs afoul of the First Amendment, which accords the Internet the highest level of protection.[46]

The prohibition against host-selling on websites that are displayed in programming also contravenes the First Amendment because the prohibition sweeps much more broadly than can be justified on any theory of protecting children from overcommercialization; the prohibition

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43 The CTA provided the FCC with the mandate to "prescribe standards applicable to commercial television broadcast licensees with respect to the time devoted to commercial matter in conjunction with children's *television* programming." 47 U.S.C. § 303a(a) (emphasis added).

44 *See id.* § 303a note ("special safeguards are appropriate to protect children from overcommercialization *on television*") (emphasis added).

45 *See 2005 Order*, 20 FCC Rcd at 2055 (¶3) (delaying the implementation date of the rules in order to "give broadcasters and cable operators more time to review and make any necessary changes to their programs *or websites to comply with these new requirements*") (emphasis added).

46 *See Reno v. ACLU*, 521 U.S. 844, 868-70 (1997).

operates 24 hours per day and effectively bans websites from providing useful commercial information to adults as well as children.[47]

The website rules also are unconstitutionally vague. The website reference rule's four-part test provides little guidance to broadcasters and cable operators that might attempt to comply with its requirements. For example, the first prong requires websites to contain a "substantial amount of *bona fide* program-related or other noncommercial content."[48] Yet the rules provide no definition of the conclusory and subjective terms "substantial amount," "*bona fide*," or "noncommercial." Likewise, the second prong of the test mandates that the website must not be "primarily intended for commercial purposes" but fails to explain what this means.[49] In some sense *any* website of a commercial entity is "primarily intended for commercial purposes," but if this were the intended meaning of the rule, it would effectively ban the display of *all* website addresses.

The website host-selling rule is equally vague. This rule prohibits "the display of website addresses in children's programs when the site uses characters from the program to sell products or services."[50] However, the rule fails to define or explain what is meant by "the site." This is extremely problematic for the broadcasters and cable operators. The "site" could, for example, range from the children's section of the domain to all websites owned by Viacom. Given the

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47 Exacerbating the constitutional infirmity of the website rules is the lack of record evidence suggesting that children are subject to overcommercialization on the Internet or that these rules will help combat any such harm. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000) ("This is not to suggest that a 10,000-page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition. The question is whether an actual problem has been proved in this case.").

48 *Order*, 15 FCC Rcd at 22961 (¶ 51) (emphasis added).

49 *Id.*

50 *Id.*

drastic sanctions that might result from a violation, the vague terms that pervade the website rules provide inadequate guidance to a broadcaster or cable operator attempting to comply in good faith.

Last, the website rules are arbitrary and capricious in violation of the APA. Because the rules are completely divorced from the rationale underlying the rulemaking, they are not the product of reasoned decision-making.[51] The Commission also ignored obvious alternatives and failed to account for the industry's voluntary efforts that already satisfy the new rules' stated objectives. Furthermore, the four-pronged website reference test is so vague and ambiguous, as explained above, that it cannot be rationally applied by the Commission or followed by regulated entities.

2. The Redefinition of "Commercial Matter" to Include Program Promotions Violates the CTA, the First Amendment, and the APA.

The Commission's redefinition of "commercial matter" to include program promotions violates both the CTA and the First Amendment and, at the very least, creates substantial questions under those sources of law.

The Commission exceeded its statutory authority under the CTA in redefining "commercial matter" to include program promotions. Congress unambiguously expressed its intent that a station's promotions of its own programs *not* be deemed "commercial matter" for purposes of the CTA's time limits. The Senate Report explains that Congress "intend[ed] that the definition" be "consistent" with the definition used by the FCC in its former FCC Form 303. The Senate emphasized that Form 303 – which regulated advertising "for which a charge is made, or other consideration received" – excluded "promotional announcements" from the

[51] *See NAACP v. FCC*, 682 F.2d 993, 997 (D.C. Cir. 1982) (explaining that reviewing court must not only "ensure that the agency's decision is not contrary to law," but also make certain that the decision is "rational" and "based on a consideration of the relevant factors").

definition.[52] Congress also included an extensive list of examples of "commercial matter."[53] Notably absent from this expansive list was any reference to a station's uncompensated promotions of its own programming. Thus, Congress clearly never intended that the FCC have any authority under the CTA to treat a broadcaster's uncompensated promotions of its own programming as "commercial matter."

Even if the Commission's redefinition of "commercial matter" to include program promotions is authorized by the CTA, however, it cannot survive constitutional scrutiny regardless of whether the definition is reviewed under the strict scrutiny standard applicable to cable programming or the more forgiving standard applicable to broadcast. Nothing in the record suggests that any harm to children arises from exposure to non-E/I program promotions. The proposed rule thus does not substantially advance an important governmental interest, as the First Amendment requires.

In addition, the exemption of E/I promotions from the revised definition of "commercial matter" evinces a content-based preference for certain speech that is impermissible under any standard of review. A programmer that wishes to schedule non-E/I shows that may appeal to viewers of children's programming is penalized by having to count against its commercial matter limit any promotions for such shows that it runs during that programming; a programmer that wishes to schedule and promote E/I shows suffers no such constraint. Indeed, the FCC's stated justification for this change – *viz.*, that the Commission favors the promotion of E/I programming

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52 *See* S. Rep. No. 101-227, at 21 (1989).

53 *Id.* ("[B]onus spots; trade-out spots; promotional announcements by a commercial television broadcast station for or on behalf of another commonly owned or controlled broadcast station serving the same community; and promotional announcements of a future program where consideration [was] received for such an announcement or where such announcement identified the sponsor of the future program beyond mention of the sponsor's name as a[n] integral part of the title of the program.").

over non-E/I programming, and specifically intends the rules to result in more E/I programming – *proves* its content-based preference.[54] For these reasons, the promotion rule cannot withstand First Amendment scrutiny.

Last, the revised definition of "commercial matter" is arbitrary and capricious because it likely will have the opposite result of the Commission's stated goal of encouraging E/I programming.[55] By forcing programmers to choose between promoting their programs and earning advertising revenue, the Commission will make it appreciably harder to fund and produce quality children's shows. The exemption for E/I promotions only compounds the irrationality of the scheme.[56]

3. The Preemption Rule Violates the APA and the First Amendment.

The Commission's new preemption rule also suffers from several legal flaws. First, as in the case of the website rules discussed above, the preemption rule suffers from a notice-and-comment defect. The *NPRM*, which focused on DTV, provided no notice that the Commission was in any way considering revising its preemption rule with respect to analog broadcasting.[57] Accordingly, virtually every commenter to address the issue framed the preemption question solely with respect to digital broadcasts.[58] The new preemption rule affects digital and analog

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54 *Order*, 15 FCC at 22964 (¶ 58) (explaining that "exempting program promotions for children's educational and informational programming may encourage broadcasters to promote this programming").

55 *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

56 *See NAACP*, 682 F.2d at 997.

57 *Id.* at 22956-58 (¶¶ 36-42).

58 *See, e.g.,* Comments of NBC, Inc., at 5 (filed Dec. 18, 2000) ("Another issue raised by the Commission in this Notice is how the agency will treat preemptions of core programs *by DTV broadcasters*.") (emphasis added); Joint Comments of Named State Broadcasters Associations, at 13 (filed Dec. 18, 2000) ("The NPRM also seeks comment on how the

television in fundamentally different ways. Had the Commission given any notice that it was considering revising its preemption policies with respect to analog broadcast, there would have been considerable comment by interested parties, particularly Viacom. The *Order* nonetheless dictates that, for *both* analog and digital broadcasters, the number of preemptions under the processing guidelines is limited to no more than 10% of core programs in a calendar quarter, averaged over a six-month period.[59] This was not reflected in the proposed rule, nor is it a "logical outgrowth" of the proposed rule.

The preemption rule is also constitutionally infirm, even under the standard of review applicable to broadcast programming. The new rule does not directly advance any important governmental interest: nothing in the administrative record suggests that the current level of preemptions causes children any harm, and indeed the record establishes that viewership in some cases *increases* when E/I programming is moved to make way for special programming.[60] Thus, the preemption rule was not necessary to address any defect in the preexisting regime, which allowed preempted and rescheduled E/I programming to be counted towards the Commission's 3-hour processing guideline, as long as the broadcaster made reasonable efforts to inform the audience when the rescheduled program would be aired.

Nor is the preemption rule narrowly tailored. In particular, the rule is excessively rigid in light of the substantial impact that it will have on broadcasters' ability to deliver speech to an audience that wishes to receive it – a core First Amendment interest. Under the new rule, broadcasters will be forced to choose between refraining from delivering live programming (such

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Commission should treat preemptions of core programming *by digital* broadcasters.") (emphasis added).

59 *Order*, 19 FCC Rcd at 22958 (¶¶ 41-42).

60 Pet. for Recons. of Fox Entertainment Group, *et al.*, at 7 (filed Feb. 2, 2005).

as news or live sports) to an audience that wishes to receive it, or moving a considerable amount of E/I programming permanently to another slot where, presumably, it will displace other programming that an audience wishes to see at that time. Forcing programmers to choose between these options, in effect displacing the broadcasters' editorial judgment of what speech should be disseminated when, is irreconcilable with the First Amendment. Moreover, the rule's express preference for "breaking news" is an unconstitutional content-based distinction.

Last, the preemption rule is arbitrary and capricious. In relying on its finding that most licensees typically preempt less than 10% of its E/I programming, the Commission ignored the fact that a significant percentage of Western and Mountain Time Zone licensees preempt in excess of 10% due to their need to accommodate live sports programming that originates from the Eastern and Central Time Zones.[61] The Commission also ignored licensees' contractual obligations to the networks to air such sports programming, failed to consider less restrictive alternatives to this inflexible rule, failed to respond to comments, and departed from past findings regarding preemption without sufficient justification.[62]

4. The Multicasting Rule Violates the First Amendment and the APA.

The multicasting rule runs afoul of the First Amendment because it is not narrowly tailored to achieve an important government interest. Notwithstanding that spectrum scarcity is of no concern in the multicasting context, the Commission extended the 3-hour "processing guideline" to all additional free multicasting streams. There is no evidence that the current level

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61 *Order*, 19 FCC Rcd at 22958 (¶ 42) (Claiming that "most stations currently do not preempt more than 10 percent of core programs in each calendar quarter").

62 *See State Farm*, 463 U.S. at 48.

of E/I programming offered on primary channels is inadequate to meet the needs of children.[63] The mere fact that broadcast *capacity* expands does not necessarily mean that the *need for E/I programming* also expands proportionately. The FCC has failed to establish that the expansion of the E/I requirement to all multicast streams effectuates the CTA's goal. Nor has the Commission demonstrated that this rule will remedy any actual harm. For these reasons, the multicasting rule, like the other rules adopted in the *Order*, is not legally sustainable.

In addition, the multicasting rule is arbitrary and capricious for at least two reasons. First, the Commission's "proportionality" framework – which requires substantial increases in children's programming – has no logical nexus to the programming needs of children, the underlying aim of the CTA. Agency action is arbitrary and capricious where it bears "no relationship to the underlying regulatory problem."[64] There simply is no correlation, and the *Order* identifies none, between the additional hours of programming that a broadcaster can offer by taking advantage of multiplexing technology and the amount of core E/I programming that is necessary to serve the needs of children.

Second, the Commission's multicasting rule is inconsistent with other agency action. In the *Digital Broadcast Order*,[65] the Commission declined "to require cable operators to carry any more than one programming stream of digital television station that multicasts."[66] In reaching this conclusion, the Commission found that the Cable Act's definition of "primary video" did not

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63 *See FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 397 (1984) (The government must show that its regulation will actually advance its asserted interest, because the "sacrifice [of] First Amendment protections for [a] speculative . . . gain is not warranted.").

64 *ALLTELL Corp. v. FCC*, 838 F.2d 551, 559 (D.C. Cir. 1998).

65 *Carriage of Digital Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516 (2005) ("*Digital Broadcast Order*").

66 *Id.* at 4532 (¶ 33).

embrace – as the broadcasters had argued – "all video that is included in a broadcaster's digital signal."[67] Here, however, the Commission reversed course and announced that "digital broadcasters that choose to provide additional channels or hours of free video programming in addition to their required free over-the-air video program service will have an increased core programming benchmark roughly proportional to the additional amount of free video programming they choose to provide."[68] In other words, the Commission essentially concluded that *each* digital programming stream is "primary" video programming subject to the processing guideline. This blatant inconsistency is the essence of arbitrary and capricious rulemaking. As the D.C. Circuit has explained, "[a]n agency cannot meet the arbitrary and capricious test by treating type A cases differently from similarly situated type B cases . . . . The treatment . . . must be consistent."[69]

B. VIACOM WILL SUFFER IRREPARABLE HARM

If the new rules are allowed to take effect before the conclusion of judicial review of the *Order*, Viacom, along with other broadcasters and cable entities, will suffer irreparable harm. First, the deprivation of First Amendment rights is the paradigmatic irreparable injury. Second, the unquantifiable economic harm that the new rules will cause – *i.e.*, diminished corporate value, loss of customers, loss of goodwill, and competitive injury – is equally irreparable.

1. Deprivation of First Amendment Rights.

As shown above, the *Order* impairs Viacom's core First Amendment rights. The new rules intrusively regulate programming and other speech by: (1) restricting the display of website

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67 *Id.* at 4531 (¶ 30).

68 *Order*, 19 FCC Rcd at 22929 (¶ 15).

69 *Independent Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996).

addresses during children's programming and subjecting the content of Viacom's subsidiaries' websites to governmental regulation; (2) banning all host-selling on websites displayed during children's programming; (3) restricting Viacom's ability to promote their own programming by redefining "commercial matter" to include promotions of non-E/I programming; (4) inflexibly limiting preemption of E/I programming, thus interfering with broadcasters' ability to deliver programming to audiences that want it; and (5) drastically expanding E/I requirements to cover multicast streams.[70] Many of these rules, as explained above, also are unconstitutionally vague.

This dramatic intrusion on core First Amendment rights is irreparable.[71] It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[72] In the First Amendment context, irreparable injury stems from the "intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future."[73]

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70 *See* Declaration of Martin D. Franks, Executive Vice President, CBS Television ¶¶ 38, 43 ("Franks Decl.") (Exhibit A attached hereto) (discussing the impact on CBS's editorial discretion); Declaration of Herb Scannell, President, Nickelodeon Networks, and Vice Chairman, MTV Networks Group ¶¶ 10-11, 37, 58, 61 ("Scannell Decl.") (Exhibit B attached hereto) (discussing the chilling effect of the new rules on Nickelodeon's ability to engage in creative expression and to communicate truthful, nonmisleading commercial speech to its viewers and customers); *see also* Administrative Stay Motion, *supra* n. 25, Exhibit C, Declaration of Walter Liss, President of the Owned Television Stations of ABC, Inc. ¶ 19 ("Liss Decl.") (discussing the impact on ABC stations' ability to televise sporting events live); Administrative Stay Motion, *supra* n. 25, Exhibit D, Declaration of Rich Ross, President, Disney Channel Worldwide ¶¶ 12-15, 34, 36-38 (discussing the impact on ABC Cable Network Group's ability to communicate its offerings to viewers and customers) ("Ross Decl.").

71 This established rule applies with equal force to commercial speech. *See, e.g., Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001).

72 *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *see also, e.g., Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989); *Branch v. FCC*, 824 F.2d 37, 40 (D.C. Cir. 1987).

73 *Newsom*, 888 F.2d at 378 (quoting *Cate v. Oldham*, 707 F.2d 1176, 1188-89 (11th Cir. 1983)).

2. Unrecoverable Economic Damages.

Compliance with the rules announced in the *Order* will also inflict irreparable harm upon Viacom in the form of unrecoverable economic damages. These damages result from: (1) money lost to government regulation that cannot be recouped because of sovereign immunity; and (2) diminished corporate value, lost customers and goodwill, and competitive injury, none of which can be calculated and all of which is irremediable by monetary damages.

Federal agencies generally enjoy sovereign immunity from money damages suffered as a result of their regulatory decisions.[74] Accordingly, money lost due to the FCC's new rules will not be recoverable from the government. For this reason, in *Iowa Utilities Board v. FCC*,[75] a case challenging the Commission's pricing and "pick and choose" rules for wireline carriers, the Eighth Circuit held that "the incumbent LECs [Local Exchange Carriers] would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules were eventually overturned, and we believe that the incumbent LECs would be unable to fully recover such losses merely through their participation in the market."[76] The same is true here. Forcing Viacom to change its programming, promotional practices, advertising, and websites will inflict significant economic damage that can never be recovered from the government if the new rules ultimately are modified or overturned. Hence, these unrecoverable economic injuries constitute irreparable harm.

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74 *Ranger v. Tenet*, 274 F. Supp. 2d 1, 6 n.2 (D.D.C. 2003) ("Indeed, money damages are generally unavailable in cases involving review of a federal agency's administrative decision.").

75 109 F.3d 418 (8th Cir. 1996).

76 *Iowa Utils. Bd.*, 109 F.3d at 426; *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (sovereign immunity precluded adequate remedy at law); *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam) (irreparable injury found where plaintiff's right to a remedy was barred under the Eleventh Amendment).

Viacom will also suffer irreparable injury in the form of unquantifiable economic losses, including: (1) diminished corporate value; (2) loss of customers (including television viewers, website users, advertisers, content providers, and business partners such as licensees), and goodwill; and (3) competitive injury.[77] Although the economic damage the rules will inflict on Viacom will undoubtedly be significant, it is difficult, if it not impossible, to ascertain that amount. Beyond the substantial revenue losses that will occur, the overall value of Viacom will likely diminish,[78] because the new rules limit the flexibility and efficiency of Viacom in, among other things, presenting a diversified menu of programming with the greatest appeal to existing and potential new viewers and business partners. Thus, it would be "exceedingly speculative" to attempt to quantify the diminution "in value between" the systems that Viacom "presently operates[] and the effectively smaller, more constrained network that compliance with the [new CTA rules] would entail."[79]

Second, Viacom's loss of customers and goodwill "is difficult, if not impossible, to quantify in terms of dollars."[80] "If customers are likely to stop patronizing a supplier because it can no longer continue to provide goods or services available elsewhere, the impossibility of

[77] *See, e.g.,* Scannell Decl. ¶¶ 34, 37-41, 45, 48; Franks Decl. ¶¶ 3, 33, 35, 40-41; Liss Decl. ¶¶ 19-22; Ross Decl. ¶¶ 9, 11-15, 34-35, 37-39.

[78] *See, e.g.,* Scannell Decl. ¶¶ 12, 48, 50-51 (describing overall harm to Nickelodeon brand value); Franks Decl. ¶¶ 25, 43 (same, for CBS brand); Ross Decl. ¶¶ 11-12 (describing overall harm to Disney brands and harm to business model of ABC Cable Networks Group and ABC Kids); *see also* Administrative Stay Motion, *supra* n. 25, Exhibit E, Declaration of Kristen Gray, Assistant General Counsel, 4Kids Entertainment, Inc. ¶ 12 (describing overall harm to 4Kids brand) ("Gray Decl.").

[79] *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673-74 (D.C. Cir. 2005).

[80] *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003); *see also Ross Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996) (irreparable injury results where business would "lose incalculable revenues and sustain harm to its goodwill").

calculating the value of this loss of goodwill amounts to irreparable injury."[81] For the reasons set forth above, the new rules are likely to drive away viewers, Internet users, advertisers, licensees, and content providers, including content providers that hold the rights for live sports events. For example, the preemption rule certainly may impair broadcasters' ability to air highly popular sports programming live during certain time periods on Saturdays, causing a loss of viewership and advertising revenue, among other things.[82] Similarly, the potential loss of Saturday morning news programs would decrease viewership, harm advertising revenues, and create additional adverse ripple effects, such as the loss of the ability to cross-promote other programming and reputational harm.[83] The lost relationships and damage to Viacom's goodwill are unquantifiable and thus constitute irreparable injury.

Finally, Viacom will suffer irreparable injury in the form of the "lost opportunity to compete."[84] In particular, the preemption limit constrains broadcasters alone among providers of video programming in their ability to air live, non-news programming, such as sports, during time slots normally allocated for E/I children's programming.[85] In addition, the promotion rule adversely affects the ability of broadcasters and cable operators to promote their own programs,

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[81] *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 n.3 (5th Cir. 1981) (citing *Guiness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468, 473 (2d Cir. 1980)).

[82] *See* Franks Decl. ¶ 26-27; Liss Decl. ¶ 19.

[83] *See* Franks Decl. ¶ 25.

[84] *PGBA, LLC v. United States*, 57 Fed. Cl. 655, 664 (2003); *see also Autoskill Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1498 (10th Cir. 1993) (agreeing with the district court that the loss of "investment and competitive position" constitutes irreparable harm); *BasicComputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992) (concluding that "the loss of fair competition . . . is likely to irreparably harm an employer").

[85] *See* Franks Decl. ¶¶ 24, 26-27.

but it does not currently affect competitors such as DBS providers,[86] public television stations and providers of other forms of video content such as DVDs.[87] Last, the multicasting rule will inflict competitive injury on Viacom. The multicasting rule does not apply to a subscription service comprised of local broadcasters' multicasting streams. That is, local broadcasters may choose, because of the unwarranted E/I burdens the multicasting rule imposes, to simply pool their multicasting capacity and offer and an over-the-air subscription service as a competitive alternative. The rule thus serves as a disincentive to the use of multicasting capacity for free over-the-air niche programming and places Viacom, a provider of such programming, at a competitive disadvantage.[88]

C. THE BALANCE OF HARMS WARRANTS AN ADMINISTRATIVE STAY

No appreciable harm to third parties will result from a stay pending appeal because the requested stay would do nothing more than maintain the *status quo*. In evaluating this factor, the issue is "whether injunctive relief would significantly harm other interested parties."[89] Even if any such harm could be identified, however, it is necessary to "'balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief.'"[90]

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[86] Although the Commission stated its intent to extend the new definition of commercial matter to DBS, it has not yet done so. *See Order*, 19 FCC Rcd at 22963 (¶ 57).

[87] *See* Scannell Decl. ¶¶ 44-47, 49; Ross Decl. ¶¶ 11-13.

[88] *See* Franks Decl. ¶¶ 11, 41.

[89] *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 110 (D.C. Cir. 1986).

[90] *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 326 (D.C. Cir. 1987) (quoting *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987)).

First, there is no evidence that any harm will result from maintaining the *status quo* pending judicial review. The rules do not concern any matter of imminent risk to public health and safety. Moreover, by delaying the effective date of certain of the rules in January 2005, the Commission implicitly acknowledged that the dramatic impact of the rules outweighed any concomitant injury associated with maintaining the *status quo*. Indeed, the Commission preserved the *status quo* for almost five years while it considered whether to adopt the new rules.

Although the record is devoid of evidence that concrete, quantifiable, non-speculative harm will result if the date of the new rules is delayed past January 1, 2006 in order to afford the D.C. Circuit an opportunity to adjudicate the merits of Viacom's appeal, Viacom has identified with particularity substantial injury to First Amendment interests and other harms that will accrue if the rules are implemented in their current form. These harms are not speculative, but will be visited upon Viacom as soon as the new rules take effect. Accordingly, this third factor weighs strongly in favor of granting the stay pending the outcome of reconsideration.[91]

D. AN ADMINISTRATIVE STAY IS IN THE PUBLIC INTEREST

Consideration of the public interest counsels in favor of granting a stay. Because the new rules trench on core First Amendment rights, "[v]indicating First Amendment freedoms is clearly

[91] *See, e.g., Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (granting relief where denial of stay would "utterly destroy the status quo" and entry of stay would only "cause relatively slight harm").

in the public interest."[92] Similarly, assuring the fulfillment of the APA's dual mandates of notice and reasoned decision-making is decidedly in the public interest.[93]

Enforcement of the rules before the completion of judicial review would contravene the public interest in other ways as well. For example, as noted above, the multicasting rule will impair both the transition to digital television and the development of new multicast channels. The Commission has long considered increasing the availability of high definition programming to be of critical importance in driving the digital transition. Toward that end, the availability of additional program streams from digital broadcasters is likely to spur the purchase of digital television sets. And by making possible the broadcast of multiple program streams, digital television offers free over-the-air broadcasters new opportunities to provide innovative program services with specialized appeal to the viewing public. For all of these reasons, hindering the growth of multicast services decidedly is not in the public interest.[94]

In addition, this is not a case where Congress's remedial purpose would be frustrated by a stay. Rather, Viacom is currently subject to rules that the Commission originally deemed adequate to vindicate Congress's purpose in passing the CTA. In contrast to a situation in which federal regulatory intervention is the only practical means of achieving a remedial objective, in the instant case the viewing public continues to enjoy the benefits of the original rules limiting children's exposure to commercial material, which have worked for many years. Further,

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92 *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *see also Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 974 (9th Cir. 2002) ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles.").

93 *See Vikonics, Inc. v. United States*, Civ. A. No. 90-2423, 1990 WL 157925, at * 2 (D.D.C. Oct. 4, 1990) (explaining that "the public interest favors government compliance with applicable statutes and regulations").

94 *See* Franks Decl. ¶ 37-38, 42.

parents have other means, completely independent of federal regulation, to reduce children's exposure to material they deem inappropriate for any reason. Accordingly, given the substantial constitutional and economic harms at stake, consideration of the public interest favors granting an administrative stay pending appeal.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant Viacom's motion for administrative stay pending appeal. In light of the harm that the current uncertainty regarding the status of the rules and their impending effective date imposes on Viacom's legal and business interests, Viacom respectfully asks that the Commission act on this request on or before October 13, 2005. Because time is of the essence, should the Commission fail to act by that date, Viacom will treat the Commission's inaction as a denial for purposes of seeking further relief.

Respectfully submitted,

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